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No. 02-443

IN THE

Supreme Court of the United States

LOUIS FREEH, *et al.*,
Petitioners,

v.

NOTRA TRULOCK, III, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Respondents' Brief in Opposition ("Opp.") underscores the need for the Court to grant certiorari to review the Fourth Circuit's decision in this case. As Respondents have now made clear, even though they assert a claim for First Amendment retaliation, they have nowhere alleged and the lower courts have nowhere found that the Petitioner FBI agents and officials were aware of the allegedly constitutionally protected speech at the time they conducted a search of Respondents' shared home, or that Petitioners' conduct was motivated by an improper motive. To the contrary, as Respondents' submission confirms, the Fourth Circuit reversed the district court's dismissal of Respondents' First Amendment retaliation claim solely on the basis of an "inference" raised by the thinnest reed of circumstantial allegations

contained in the complaint. 275 F.3d 391, 405; Petitioners' Appendix 20a. In so doing, the Fourth Circuit misapplied both the letter and the spirit of this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998), which requires that a complainant allege *specific, non-conclusory* factual allegations of wrongdoing in motive-based claims against federal officials in their personal capacity, since such claims are "easy to allege and hard to disprove" and carry potentially grave financial and social costs. *Id.* at 585. The district court heeded this Court's admonition; the Court of Appeals did not.

I. RESPONDENTS' BRIEF CONFIRMS THAT THE COURT OF APPEALS PERMITTED THE FIRST AMENDMENT RETALIATION CLAIM TO PROCEED SOLELY ON THE BASIS OF AN "INFERENCE."

Despite Respondents' lip service to the contrary, the Fourth Circuit here sustained Respondents' First Amendment retaliation claim solely on an "inference" of improper motive. That decision squarely conflicts with this Court's holding that such motive-based claims must rest on "specific, non-conclusory factual allegations." *Crawford-El*, 523 U.S. at 598.

While Respondents' brief spends several pages suggesting that the Fourth Circuit's decision rested on six "facts" and not mere inference, *see* Opp. at 6-8, this Court need not tarry in dispensing with this entirely transparent contention. Regardless of how Respondents would now spin it, the Fourth Circuit's opinion expressly states that the First Amendment retaliation claim could proceed because of "a reasonable ***inference*** that the interrogation and search were retaliatory." 275 F.3d at 405; Petitioners' Appendix 20a (emphasis added).[1] The basis for the holding—*i.e.*, that "inference"—

[1] Moreover, not only are the six "facts" noted by Respondents entirely circumstantial (*see* Opp. at 10), but one of the "facts"—*i.e.*, that a criminal

could not be clearer. And, it could not be more clearly incorrect. This Court has made abundantly plain that, given the significant costs and burdens associated with motive-based *Bivens* allegations against federal officials, federal courts must vigilantly apply the Federal Rules of Civil Procedure to weed out suits that fail to allege specific, non-conclusory factual allegations sufficient to sustain a claim. *Crawford-El*, 523 U.S. at 597-98. This is precisely such a suit, and the district court—which is best situated to make such determinations, *see id.* at 600-01—correctly dismissed the action in its entirety.

Respondents' "inference" smoke screen fails to conceal the complaint's ultimate—and fatal—defects. Despite their vague references to the at-issue magazine article's availability in "early July," Respondents have never specifically alleged that the article was available by July 14, the day on which Petitioners Halpin and Carr conducted a search of the home that Respondents shared.[2] Respondents have never alleged

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referral from DOE was a necessary prerequisite to the FBI's investigation of Trulock—is no "fact" at all. As a matter of *law*, no such referral is necessary. 28 U.S.C. § 535. In addition, two more of the "facts" cited by Respondents are immaterial, for they are based on conduct by Lawrence Sanchez—an unrelated third-party. Opp. at 7. The Fourth Circuit clearly could not have rested its decision on any conduct by Sanchez, as Respondents suggest, since the court expressly noted that there is no allegation that Petitioners directed or even were aware of Sanchez's alleged conduct. 275 F.3d at 398; Petitioners' Appendix 12a.

[2] Respondents' only effort to address this pleading deficiency is to meekly argue that "many periodicals are dated after the time that they become available in print." Opp. at 11 n.3. However, Respondents still have yet to identify when copies of the at-issue July 31, 2000 *National Review* actually were available or to allege whether that date preceded the July 14, 2000 search of the home. Respondents certainly never have offered any explanation for how copies of the *National Review*, a weekly periodical, could be "available in print" *seventeen days* before their cover date.

that the FBI or anyone in the agency—including the particular FBI agents and officials named as defendants in this suit—was aware of or had read the article by that date. Likewise, Respondents have never alleged that any of the named defendants here had any improper intent whatsoever when the search was conducted. Indeed, as the Fourth Circuit expressly recognized, the complaint does not even allege any direct involvement at all by three of the five Petitioners. *See* 275 F.3d at 402; Petitioners' Appendix 14a. Nor have Respondents ever alleged (in anything other than a conclusory fashion) that the article was entitled to First Amendment protection. Similarly, Respondents have never suggested that the alleged retaliation impacted Trulock's protected speech in any way or that the search would not have occurred but for the publication of the article. Without these key facts, there simply can be no sustainable claim for retaliation. *See, e.g., Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000) (listing required elements for First Amendment retaliation claim in Fourth Circuit).[3]

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[3] Indeed, Respondents appear to concede the point when citing to a recent Sixth Circuit decision that recognized the Fourth Circuit's decision here as standing for the proposition that mere "circumstantial evidence of improper intent"—*i.e.*, an inference—is sufficient to support a First Amendment retaliation claim. *See* Opp. at 9-10 (citing *Goad v. Mitchell*, 297 F.3d 497, 505 (6th Cir. 2000)). Of course, that proposition is entirely inconsistent with *Crawford-El* and only confirms that the Fourth Circuit's misapplication of this Court's jurisprudence has spawned confusion among the lower courts in how to handle motive-based claims against federal officials in their personal capacities. In fact, at least one other Circuit still applies a heightened pleading standard to motive-based *Bivens* actions, further emphasizing the need for this Court to grant the petition to rectify this continuing confusion. *See Judge v. City of Lowell*, 160 F.3d 67, 73 (1st Cir. 1998); *see also Galbraith v. County of Santa Clara*, No. 00-17369, 2002 U.S. App. LEXIS 21064, at *12-*15 (9th Cir. Oct. 9. 2002) (rejecting *Judge* as "not consistent with *Crawford-El*" (citing *Currier v. Doran*, 242 F.3d 905, 914-17 (10th Cir. 2001); *Gallardo v. DiCarlo*, 203 F. Supp.2d 1160, 1163-64 (C.D. Cal. 2002) ("*Judge* . . .

The district court recognized these fatal flaws in Respondents' complaint when it dismissed the action in its entirety. *See* Petitioners' Appendix 42a. Given Respondent Trulock's ready access to classified information in his capacity as Director of the Offices of Intelligence and Counterintelligence at the Department of Energy, and his subsequent submission of a "personal reflections-type manuscript" based on his experiences in that post, the district court had little trouble concluding that "the complaint presents no indication that the actions by defendants were other than a good faith effort to determine whether classified information was being unlawfully possessed." *Id.* This Court has observed that such judgments by the district courts, which are more experienced in cases involving motive-based allegations against government officials, should be afforded considerable deference. *Crawford-El*, 523 U.S. at 600-01.

Nevertheless, Respondents suggest that this deference extends only to judgments by the district court in "managing discovery" in such cases, and not in "evaluating the legal sufficiency of claims." Opp. at 9. However, here again, Respondents' self-serving interpretation squarely contradicts the plain language they interpret, for this Court expressly has stated that it is the district court's "exercise [of] discretion . . . that protects the substance of the qualified immunity defense." *Crawford-El*, 523 U.S. at 598. Certainly, that

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significantly misreads *Crawford-El*"); *Greenier v. PACE, Local No. 1188*, 201 F. Supp.2d 172, 177 (D. Me. 2002))); *Eaton v. Meneley*, 180 F. Supp.2d 1247, 1252-54 (D. Kan. 2002) (discussing courts' continuing struggles with *Crawford-El* on this point); *Rodriguez-Vazquez v. Cintron-Rodriguez*, 160 F. Supp.2d 204, 208 n.1 (D. P.R. 2001) (citing both *Crawford-El* and *Judge* to support that "[t]he 'heightened pleading standard' is still required for those cases where . . . improper motive . . . constitute[s] an essential element of the . . . claim"); *Goodman v. The President & Trustees of Bowdoin Coll.*, 135 F. Supp.2d 40, 50-52 (D. Me. 2001) (analyzing *Judge*'s reliance on strict language of *Crawford-El*, and attendant propriety of *Judge*'s extension to other civil rights suits).

discretion includes, when necessary, the "complicated analysis of legal issues." *Id.* The Fourth Circuit impermissibly disregarded this directive in substituting its judgment for that of the district court in this action, and the Court should grant the petition to correct this error.

II. RESPONDENTS' BRIEF FAILS TO SALVAGE THE FOURTH CIRCUIT'S MISAPPLICATION OF THE QUALIFIED IMMUNITY DEFENSE.

Not only have Respondents failed to allege sufficient facts to sustain a claim of First Amendment retaliation, but Petitioners further are entitled to qualified immunity for their alleged actions. Indeed, the Fourth Circuit expressly recognized Petitioners' qualified immunity defense in affirming the dismissal of Respondents' Fourth Amendment claims, 275 F.3d at 404; Petitioners' Appendix 17a, but inexplicably disregarded that immunity when permitting the First Amendment claim to go forward. 275 F.3d at 406; Petitioners' Appendix 20a. Respondents vainly attempt to justify the Fourth Circuit's seemingly inconsistent application of the qualified immunity defense, arguing that—even though Petitioners might have thought the at-issue search was permissible, thus affording them qualified immunity on the Fourth Amendment claims—they should have known that the same legally permissible search was undertaken for an impermissible reason, thereby destroying their immunity. *See* Opp. at 12. However, Respondents' argument fails for two principal reasons.

First, the very same conduct is at issue for both the First Amendment and the Fourth Amendment claims. In fact, the First Amendment claim here is dependent on the Fourth Amendment allegations. Accordingly, the same qualified immunity analysis should apply to both. Where the Fourth Circuit concludes that the conduct at issue (*i.e.*, the search and interrogation) is constitutionally permissible under the Fourth Amendment, it cannot be the case that Petitioners

could be liable for a First Amendment violation based on that same conduct. Either the conduct is permissible or it is not. And if the conduct at issue is within legal bounds, then Petitioners enjoy qualified immunity.

Second, Respondents' argument is based entirely on a factual assumption that Respondents have never alleged: namely, that the Petitioner FBI agents had knowledge of the article and a retaliatory motive in conducting the search. *See* Opp. at 11-12. As set forth above, the requisite specific allegations are conspicuously absent from the complaint and from the Fourth Circuit's decision. Quite simply, Respondents have never claimed that Petitioners were aware of, had read, or were otherwise motivated by the article when they conducted the otherwise permissible search of the home shared by Respondents. Accordingly, even under Respondents' theory of the qualified immunity defense, the complaint offers no basis to conclude that Petitioners reasonably knew that they were acting in violation of Respondent Trulock's rights when they conducted a legal search of the home. The Fourth Circuit's denial of qualified immunity therefore was in error, and this Court should grant the petition to correct that mistake.

III. RESPONDENTS' BRIEF MISREPRESENTS THE SPLIT AMONG THE CIRCUITS ON AN IMPORTANT ISSUE OF FEDERAL LAW.

Finally, despite Respondents' vehement denial of a circuit split on the legal issues at the heart of this case, *see* Opp. at 13-14, a truly "thorough reading" of the relevant caselaw reveals a conflict among the circuits on what is necessary to state a cognizable claim for retaliation under the First Amendment—an issue directly implicated by this action. The Court should grant the petition to address the conflict among the lower courts on this important issue of federal constitutional law.

As the Fourth Circuit recognized, this case, like any other presented on a motion to dismiss under Rule 12, necessarily encompasses an examination of the elements of the substantive causes of action involved in the litigation. *See* 275 F.3d at 404; Petitioners' Appendix 18a (citing *Suarez Corp.*, 202 F.3d at 685-86). However, the Fourth Circuit plainly disagrees with its sister circuits on precisely what the elements of that substantive cause of action are. The particular element at issue, as recently stated in *Keenan v. Tejeda*, 290 F.3d 252 (5th Cir. 2002), is that, in order to sustain a claim for First Amendment retaliation, the plaintiff must show "that the defendants' actions caused . . . an injury that would chill a person of ordinary firmness from continuing to engage in that activity." *Id.* at 258; *see also* Opp. at 14. In that case, the Fifth Circuit joined the Fourth Circuit (as well as the First and Second Circuits), in finding that this element involves two distinct inquiries. *Keenan*, 290 F.3d at 259-60; *Suarez Corp.*, 202 F.3d at 685-86; *see also Spear v. Town of West Hartford*, 954 F.2d 63, 67 (2d Cir. 1992); *Sullivan v. Carrick*, 888 F.2d 1, 4 (1st Cir. 1989). First, a court must consider whether the alleged conduct of the defendants would, in fact, "chill a person of ordinary firmness." *Keenan*, 290 F.3d at 258. Second, a plaintiff must "*actually suffer an injury* . . . which, in this context, is the deprivation of a constitutional right." *Id.* at 259 (emphasis added). As Respondents note, these two inquiries may be characterized, respectively, as "objective and subjective factors." Opp. at 15. However, Respondents fail to appreciate that the second, subjective factor is concerned with what *the plaintiff* has done, *not*, as Respondents emphasize, the defendant's alleged actions. *See* Opp. at 15.

Moreover, Respondents fail to appreciate that this subjective factor is unique to the First, Second, Fourth, and Fifth Circuits. Despite articulating their definitions of a First Amendment retaliation claim in similar language, the Sixth, Ninth, or Tenth Circuits have never joined the Fourth Circuit in adopting a "subjective factor." *See Smith v. Plati*, 258 F.3d

1167, 1177 (10th Cir. 2001) ("The focus, of course, is upon whether a person of ordinary firmness would be chilled, *rather than whether the particular plaintiff* is chilled." (emphasis in original omitted) (emphasis in quotation supplied)); *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999) ("[I]t would be unjust to allow a defendant to escape liability . . . because an unusually determined plaintiff persists in his protected activity. . . ."); *Bloch v. Ripar*, 156 F.3d 673, 679-81 (6th Cir. 1998) (plaintiffs' "allegation of injury based on embarrassment, humiliation, and emotional distress," without additional allegation that protected activity was ceased, "is sufficient to be actionable"). Thus, while these Circuits recognize a claim for First Amendment retaliation, regardless of whether the allegedly retaliatory conduct actually impacted the plaintiff, a plaintiff in the First, Second, Fourth, or Fifth Circuits can state a claim only if the allegedly retaliatory conduct *actually stopped* the plaintiff from exercising some right.[4] Therefore, the Circuits apply fundamentally different analyses, potentially resulting in fundamentally different results, to the very same First Amendment claims. This important issue of federal constitutional law cannot depend merely on the geography of the state in which the claim arose. Granting the petition will allow this Court to resolve this conflict.

Furthermore, in an apparent concession, Respondents fail to even address the second circuit split raised by the petition. As Petitioners previously noted, the Circuits are divided on the appropriate manner to address the sufficiency of the

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[4] The thrust of Respondents' argument appears to be that, even though the Sixth, Ninth and Tenth Circuits have failed to articulate a subjective factor as part of their analyses, that factor nevertheless was present in each case Petitioners invoke. *See* Opp. at 15. Of course, whether the subjective factor may or may not have been satisfied in those particular cases does not change the legal standard those decisions actually used—a standard that plainly does not *require* such a finding.

complaint in First Amendment retaliation cases. Specifically, the Fourth and Ninth Circuits hold that "[d]etermining whether a plaintiff's First Amendment rights were adversely affected by retaliatory conduct is a *fact-intensive inquiry* that focuses on the status of the speaker, the status of the retaliator, and the nature of the retaliatory acts." *Suarez Corp.*, 202 F.3d at 686 (emphasis added); *Mendocino County*, 192 F.3d at 1300. In these jurisdictions, courts will look behind the face of a retaliation complaint and are more apt to sustain claims challenged by a motion to dismiss. In contrast, and more consistent with the policy concerns underlying *Crawford-El*, the First and Second Circuits will dismiss those First Amendment retaliation complaints that are "conclusory and speculative, . . . offer[ing] nothing beyond a bare assertion that the [retaliation] caused a chilling effect . . . ." *Spear*, 954 F.2d at 67 (internal quotation omitted); *Sullivan*, 888 F.2d at 4 ("Where a chilling effect is speculative or too remote, finding an abridgment of First Amendment rights is unfounded."). In these Circuits, such complaints "do[] not suffice to defeat a Rule 12(b)(6) motion." *Id.*

Here, of course, the Fourth Circuit's more lenient, "look-beyond-the-complaint" approach is directly at issue, having resulted in a reversal of the district court's dismissal of an otherwise insufficient complaint. This approach quite likely has produced a very different outcome than had the First Amendment claim been brought in the First or Second Circuit. Respondents do not suggest differently or otherwise contest the point. Accordingly, given the undisputed split among the Circuits as to how to approach the sufficiency of a complaint alleging First Amendment retaliation, the Court should grant the petition to clarify this issue of federal constitutional law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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